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In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Employers Insurance of Wausau and Federal Insurance Company, respectfully pray that this Court decline to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, dated January 23, 1992.

STATEMENT OF THE CASE

Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal") contributed $13 million towards a $13.5 million settlement between class action plaintiffs and all named defendants in *In re Cousins Securities Litigation*, No. 84-1821-B(IEG) ("Cousins"). In connection with this settlement, the defendants sought and obtained a full release from the plaintiff class of 100% of their claims, including those against all named defendants, as well as those against the non-named lawyers and accountants who provided expert advice in connection with a $30,000,000 public offering.

Wausau and Federal, as subrogees of the insureds, filed this action seeking contribution (the subject of the instant petition) from the lawyers and accountants for the *Cousins* defendants. Although it is alleged in this contribution action that these lawyers and accountants bore the primary responsibility for the shareholder plaintiffs' losses, for whatever reason they were not named in the underlying *Cousins* litigation. To deny a right of contribution action against the lawyers and accountants would thrust the entire liability on settling defendants who were perhaps only fractionally at fault, and would allow tortfeasors that were the main cause of plaintiffs' loss to escape liability completely.

I.

THE RIGHT OF IMPLIED CONTRIBUTION UNDER SECTION 10(b) AND RULE 10b-5 HAS BEEN RECOGNIZED THROUGH JUDICIAL INTERPRETATION FOR ALMOST A QUARTER OF A CENTURY

A. Contribution is Now a Well-established Equitable Doctrine Which Allows Joint Tortfeasors to Apportion Their Liability

Contribution is an equitable doctrine which allows defendants to require joint tortfeasors, even those not named by the plaintiff, to bear their fair burden of the plaintiff's damage award. *Nelson v. Bennett*, 662 F. Supp. 1324, 1327-28, (E.D. Cal. 1987). This is a modification of the English common law rule that intentional joint tortfeasors were not able to seek contribution from one another. *Id.* at 1328, citing Restatement (Second) of Torts § 886(A)(3) (1977); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 557 (5th Cir 1981), *aff'd and rev'd in part on other grounds* 459 U.S. 375 (1983). The no-contribution rule was gradually eroded on the equitable basis that it was unfair to require one defendant to bear the entire loss resulting from injury that he or she had not alone caused, or to permit the plaintiff for whatever motive, benign or invidious, to select one defendant from which he or she wished to recover. *Huddleston*, 640 F.2d at 557.

Today, most states permit some form of contribution among joint tortfeasors, even though there is little uniformity among the various state statutes and decisions, as well as great variation in both the measure of damages and the effect of a settlement on the right to contribution.

Alvarado Partners, L.P. v. Mehta, 723 F. Supp. 540, 549 (D. Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

Proponents of the right to contribution recognized the inherent unfairness of thrusting the entire liability on one defendant who was only partially at fault. Defendants with little monetary resources, and sometimes equally small liability, were often compelled to settle with the plaintiff at an exaggerated price to avoid the potentially catastrophic consequence of solitary responsibility and the exaggerated costs of complex litigation. Because of plaintiff's superior negotiating strength, proscription of the right to contribution encourages collusion and bribery between the plaintiff and potential defendants. Actions for contribution benefit both the plaintiff and the legal system by facilitating discovery as defendants who were involved in a common scheme are often in a better position to demonstrate the relative culpability of their confederates. Also, plaintiff's prospect of full recovery is improved because contribution permits joinder of all potential defendants in the original action. Lastly, because contribution affects a greater number of tortfeasors, it produces a larger, although diluted, deterrent effect. O'Shaughnessy, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, XVI Suffolk U.L. Rev. 983, 988-89, (1982).

B. The Parameters of Section 10(b) and Rule 10b-5 Have Developed Almost Exclusively Through Judicial Interpretation

1. A Private Right of Action Under Section 10(b) and Rule 10b-5 Developed Through Judicial Interpretation and Application

While state tort law regarding contribution has developed largely through statutes, contribution in the context of the securities laws has been expanded primarily through judicial interpretation. Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution, Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987) 57 U. Cin. L. Rev. 769, 772 (1988). The federal securities laws were passed in the 1930's in the aftermath of the 1929 market crash. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976). Although neither Section 10(b) nor Rule 10b-5 created an express civil remedy, nor is there any indication that Congress or the Securities and Exchange Commission contemplated such a remedy, a private cause of action for violation of the statute and the rule has become well established through judicial interpretation. *Id.* at 196; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Heizer v. Ross*, 601 F.2d 330, 331-32 (7th Cir. 1979). This Court has acknowledged that the private right of action under Section 10(b) is "a judicial oak which has grown from little more than an acorn." *Blue Chip Stamps*, 421 U.S. at 737. "[A] private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 & n.10 (1983).

2. The Implied Right of Contribution Is a Necessary Remedy to the Implied Private Cause of Action Under Section 10(b) and Rule 10b-5

With the establishment of a private right of action, the courts continued in their process of defining the scope of Section 10(b) and Rule 10b-5 and it became necessary to define remedies available to private parties damaged by violations of those provisions. *Alvarado Partners*, 723 F. Supp. at 550. First the courts determined the availability of contribution in securities fraud cases was a matter of federal law, and where that availability was to be implied, a matter of federal common law. *Heizer*, 601 F.2d at 331; *accord Huddleston*, 640 F.2d at 557. The courts then reasoned that the existence of a statutory right implied the existence of all necessary and appropriate remedies; and the power to make the right of any recovery effective implied the power to utilize any procedures or actions normally available to a litigant according to the exigencies of the litigant's case. *Heizer*, 601 F.2d at 332.

The 1968 case of *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, (1968) *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970), was the first case to imply a right of contribution in favor of a defendant whose liability had been established by an implied private cause of action under Section 10(b). In *deHaas*, the defendant corporation brought a contribution claim against its corporate counsel for the latter's alleged misrepresentations in connection with a corporate reorganization. *Id.* at 815. The court reasoned that contribution should be permitted when liability is implied under Section 10(b) because contribution is explicitly authorized by

the express civil liability provisions of the securities laws. *Id.* at 815-16.[1]

Two years later, a federal district court in *Globus v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58, (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), implying contribution, relied on *deHaas*, and recognized that the general trend of current law was towards the allowance of contribution among joint tortfeasors. The Seventh Circuit in *Heizer*, 601 F.2d at 331-32, held that judicial implication of contribution under Section 10(b) was a matter of federal common law and that other express civil remedies expressly provide for contribution.[2]

In *Huddleston*, 640 F.2d at 558 the Fifth Circuit relied on the rationale of *Heizer, supra*, and determined that allowing implied contribution under Rule 10b-5 satisfies the objective of deterrence under the securities laws as explained more fully below. Thus, it was with the weight of, and citation to, these Circuit Court cases as precedent that the Ninth Circuit stated in *Smith v. Mulvaney*, 827 F.2d 558,

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[1] These express contribution sections are Securities Exchange Act of 1934, §§ 9, 18, 15 U.S.C. §§ 78i, 78r; Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f).

[2] The Seventh Circuit in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989) severely criticized *Heizer v. Ross*, 601 F.2d 330, but did not overrule it. *King* is limited to whether the federal courts may imply *indemnity* in the context of the securities laws and such holding is entirely consistent with *Heizer*, 601 F.2d at 334. Thus because the issue of contribution was not before the court in *King*, Respondents cite *Heizer v. Ross* as good precedent.

560 (9th Cir. 1987): "We hold that an implied right of contribution exists under Section 10(b) and Rule 10b-5. This is in accord with the other circuits that have decided this issue."

Since *deHaas, Globus, Heizer, Huddleston, and Mulvaney* federal courts considering the question of implied contribution have also, with few exceptions, held that a right to contribution exists in actions under Section 10(b) and/or Rule 10b-5.[3] In so implying contribution, courts have

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[3] **First Circuit:** District Courts – *MFS Mun. Income Trust v. American Medical Intern.*, 751 F. Supp. 279 (D. Mass. 1990); *In Re Atlantic Financial Management, Inc. Securities Litigation*, 748 F. Supp. 1012 (D. Mass. 1988). **Second Circuit: Court of Appeals** – *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838, *cert. denied*, 459 U.S. 908; *Globus, Inc. v. Law Research Service*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). **District Courts** – *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972); *Herzfield v. Laventhol, Krekstein, Horwath, & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Liggett & Myers Inc. v. Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc. v. Peat, Marwick, M. & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975); *Rice v. McDonnell & Co.*, 442 F. Supp. 952 (S.D.N.Y. 1977); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *Noonan v. Granville-Smith*, 532 F. Supp. 1007 (S.D.N.Y. 1982) *opinion supplemented by* 535 F. Supp. 333 (S.D.N.Y. 1982); *Greene v. Emerson Ltd.*, 102 F.R.D. 33 (S.D.N.Y. 1983), *aff'd on other grounds, Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29 (2d Cir. 1984); *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707 (S.D.N.Y. 1984); *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656

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both looked to statutory interpretation as well as policy considerations.

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(S.D.N.Y. 1986); *Department of Economic Development v. Arthur Andersen & Co.*, 747 F. Supp. 922 (S.D.N.Y. 1990); *Department of Economic Development v. Fetherston*, 739 F. Supp. 804 (S.D.N.Y. 1990); *In Re Crazy Eddie Securities Litig.*, 740 F. Supp. 149 (E.D.N.Y. 1990); *McCoy v. Goldberg*, 778 F. Supp. 201 (S.D.N.Y. 1991). **Third Circuit: District Courts** – *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D.Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *B & B Inv. Club v. Kleinhart's Inc.*, 391 F. Supp. 720 (E.D.Pa. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D.Pa. 1975); *McLean v. Alexander*, 449 F. Supp. 1251 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880 (D.N.J. 1984); *In Re Nat'l Smelting of New Jersey, Inc. Bondholders Litig.*, 722 F. Supp. 152 (D.N.J. 1989). **Fourth Circuit: Court of Appeals** – *In Re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991). **District Courts** – *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565 (D.S.C. 1991). **Fifth Circuit: Court of Appeals** – *Kuenhert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983). **District Courts** – *Marrero v. Abraham*, 473 F. Supp. 1271 (E.D.La. 1979); *In Re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655 (S.D.Tex. 1989). **Sixth Circuit: District Courts** – *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163 (S.D.Ohio 1987); *Baker v. BP America Inc.*, 749 F. Supp. 840 (N.D.Ohio 1990). **Seventh Circuit: Court of Appeals** – *Madigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979). **District Courts** – *In Re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597 (N.D.Ill. 1987). **Ninth Circuit: Court of Appeals** – *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987). *District Courts – Ahern v.*

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The *deHaas* court and the other Circuits have relied on statutory construction for the proposition that contribution should be permitted when liability is implied under Section 10(b) because contribution is explicitly authorized by the express civil liability provisions of the securities laws. Also it has been posited that the fact there is explicit authorization of the right to contribution for both negligent and intentional violation of the securities laws is strong evidence that Congress would have permitted contribution under Section 10(b) if it had explicitly created a private cause of action under that section. Adamski, *Contribution and Settlement in Multiparty Actions under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981). Thus, because some of the civil liability sections that expressly allow contribution (Securities Exchange Act of 1934, §§ 9, 18, 15 U.S.C. §§ 78i, 78r) allow for contribution for the equivalent of intentional conduct, contribution ought not to be denied under Section 10(b) or Rule 10b-5 actions merely because those provisions require a finding of scienter.

As for policy reasons, the cases have relied on three: the trend of the law (*Globus*, 318 F. Supp. at 957; *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. at 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); the deterrent effect (*Globus*, 318 F. Supp. at 958; *Marreo v. Abraham*, 473 F. Supp. 1271, 1278 (E.D. La.); *Huddleston*, 640 F.2d at 558); and fundamental fairness (*Marreo*, 473 F. Supp. at 1277; *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).[4]

As aptly put by this Court: "[I]t would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of law with respect to Rule 10b-5. It is therefore proper that we consider . . . policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional

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Gaussoin, 104 F.R.D. 37 (D.Or. 1984); *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D.Cal. 1987). **Tenth Circuit: District Courts** – *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970). **District of Columbia Circuit: District Courts** – *In Re Nat'l Student Mktg. Litig.*, 517 F. Supp. 1345 (D.D.C. 1981).

[4] In support of the policy reasons allowing contribution it was recognized that "[t]he common law rule precluding intentional wrongdoers from seeking contributions developed long before the evolution of multiparty litigation involving class plaintiffs, numerous defendants vast monetary claims, lengthy trials and enormous litigation costs. The disallowance of contribution in the context of such modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action. Thus, the no-contribution rule promotes a rush to settlement whereby certain defendants can purchase freedom from litigation and the ultimate court judgment, simultaneously providing the plaintiffs with funds to finance the continuation of the suit against the non-settling defendants. Moreover, the settling defendants may well extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment." *Huddleston*, 640 F.2d at 558.

enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737.

II.

AFTER ALMOST TWENTY-FIVE YEARS OF IMPLIED CONTRIBUTION, RATHER THAN EVIDENCING A STRONG SPLIT AMONG THE CIRCUITS, THE EIGHTH CIRCUIT'S *CHUTICH V. TOUCHE ROSS & CO.* IS AN ANOMALY

Petitioners' principal contention in their Petition is that somehow the decision of *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992) abrogates almost a quarter of a century of judicial determinations upholding the right to implied contribution. Instead, *Chutich* is an anomaly, arising from a Circuit and state that deals with a dearth of securities fraud cases.

A. *Chutich v. Touche Ross & Co.* Is Wrongly Decided Having Misapplied *Texas Industries v. Radcliff Materials, Inc.* and *Northwest Airlines v. Transport Workers Union*

For the proposition that contribution should not be implied under Section 10(b) and Rule 10b-5, *Chutich* and two other officially published district court cases rely on two 1981 Supreme Court cases which declined to allow contribution for other unrelated federal private causes of action. However, a variety of federal court opinions since 1981 suggest that the Eighth Circuit's reliance on the two Supreme Court opinions is totally misplaced because the two cases expressly reserved judgment as to whether their reasoning was to be applied in the arena of securities law.

1. Nothing in Either *Texas Industries v. Radcliff Materials Inc.* or *Northwest Airlines v. Transport Workers Union* Mandates That Their Reasoning Should be Applied in the Arena of the Securities Laws

In *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), Northwest Airlines sought contribution from two unions after a judgment had been entered against it because of pay disparity between male and female flight attendants, a violation of the Equal Pay Act and Title VII of the Civil Rights Act. Northwest brought its own action against the unions, arguing that it was entitled to contribution because the illegal pay structure had been part of a collective bargaining agreement with the unions. *Id.* at 80-82. This Court concluded Northwest could not claim any right of contribution under either the Equal Pay Act or Title VII. After looking to the text of the statutes and their legislative histories, and emphasizing that the laws were enacted solely to establish statutory rights of the employees as against employers, this Court deemed that Northwest could not be a "beneficiary" under the statutes and was thus barred from seeking contribution. *Ibid.* This Court also included a footnote indicating that it was aware that federal courts had recognized an implied right to contribution under the securities laws where the underlying liability resulted from an implied private right of action, but it specifically stated that it chose not to comment on the merit of those decisions. *Id.* at 91, n.24.

A similar conclusion was reached in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, which involved

the Sherman and Clayton antitrust acts. One of Texas Industries' customers filed a civil antitrust action against it, alleging that Texas Industries, a concrete manufacturer, and other concrete manufacturers had entered into a price fixing conspiracy. *Id.* at 632-33. This Court held that Texas Industries could not seek contribution from the other manufacturers with which it had allegedly conspired. Relying on its reasoning in *Northwest Airlines*, this Court refused to find a right of contribution, emphasizing the absence of contribution in the statutory scheme and held that antitrust violators were not members of the "class" intended to benefit from the antitrust laws. *Id.* at 639-40.

Again, in a footnote, this Court specifically recognized it was aware of the federal courts' implied right to contribution under the securities laws, but, citing to *Northwest Airlines* stated that it did no intimate any view as to the correctness of these decisions. *Texas Industries* at 640 n. 11. This footnote, and the other footnote appearing in *Northwest Airlines*, are the subject of a more extensive discussion below.

B. The Holdings in *Texas Industries v. Radcliff* and *Northwest Airlines v. Transport Workers Union* are Inapposite and Therefore Almost All Federal Courts Since 1981 Have Continued to Imply the Right of Contribution Under Section 10(b) and Rule 10b-5

1. Several Federal Courts Have in Fact Considered the Effect of *Texas Industries v. Radcliff* and *Northwest Airlines v. Transport Workers Union* and Have Found that the Supreme Court Expressly Reserved Judgment on the Question of the Applicability of Its Reasoning to Section 10(b) and Rule 10b-5 Cases

Petitioners contend that federal courts have continued to imply contribution under Section 10(b) and Rule 10b-5 without considering the effect of *Texas Industries* and *Northwest Airlines*. This is simply not the case.

First in *In Re National Student Marketing Litigation*, 517 F. Supp. 1345, 1348 (D.C. 1981), the court held that the defendant (who was seeking to avoid the application of implied contribution under Section 10(b) and Rule 10b-5) could not rely on *Texas Industries* and *Northwest Airlines* for that purpose. The court recognized that the Supreme Court in those two cases dealt only with the two statutory schemes before it. *National Student Marketing* at 1348. In so determining the *National Student Marketing* court relied on a footnote in each of the two Supreme Court cases. *Id.* at 1348-49. First in *Northwest Airlines* this Court determined that:

> "Congress expressly provided for contribution among joint wrongdoers in the Securities Act of

1933, see 15 U.S.C. § 77k(f), and in the Securities Exchange Act of 1934, see 15 U.S.C. §§ 78i(e), 78r(b). Thus, at least in these instances, when Congress wanted to provide a right to contribution, it did so expressly.

A number of federal courts have recognized an implied right to contribution under the securities law where the underlying liability resulted from an implied private right of action. These courts have reasoned that because Congress expressly created a right to contribution to correspond to certain express civil remedies, contribution should also be permitted when liability is based on an implied civil remedy. See e.g. *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346, (2d Cir. 1971), *cert. denied* 404 U.S. 941, 92 S.Ct. 286, 30 L.Ed.2d 254. Whatever the merit of this reasoning, a question we do not now address, these decisions provide no support for petitioner in this case." *Northwest Airlines*, 451 U.S. at 91, n.24.

A month later in *Texas Industries* this Court stated:

> "That Congress knows how to define a right to contribution is shown by the express actions for contribution under § 11(f) of the Securities Exchange Act of 1933, 15 U.S.C. §§ 78k(f) and §§ 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(b). Some courts have extrapolated from these provisions that when an implied right of action exists under the securities laws, there also is an implied right to contribution. See, e.g., *Heizer Corp v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y.), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S 9841, 92 S.Ct. 286, 30 L.Ed.2d 254 (1971); *De Haas v. Empire Petroleum Co.*, 286 F. Supp. 809 (Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970). We intimate no view as to the correctness of these decisions; in any event they do not support implication of right to contribution when a statute expressly creates a damages action but does not provide for contribution. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91-92, n.24, 101 S.Ct. 1571, n.24, 67 L.Ed.2d 1451." *Texas Industries*, 451 U.S. at 640, n.11.[5]

Thereafter, the district court in *National Student Marketing* noted that this Court had the opportunity to consider the issue of implied contribution in Federal securities laws a few months after it decided *Texas Industries* and *Northwest Airlines*, but declined to do so by denying certiorari in *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) [an action brought under 15 U.S.C. § 78k(a) involving trading by members of exchanges, brokers and dealers]. Respondents here are aware that it is well-settled that a denial of a petition for a writ of certiorari carries with it no implication whatever regarding the Supreme Court's views on the merits of the case the Court declined to review. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949).

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[5] Respondents wish to point out that Petitioners in their discussion of *Texas Industries* never once mention the famous footnote 11 or *Northwest Airlines'* equally significant footnote 24.

However, in *Herman & MacLean v. Huddleston*, 459 U.S. at 379, this Court considered two issues from the Fifth Circuit case of *Huddleston v. Herman & MacLean*, 640 F.2d 534: 1) whether an implied cause of action under Section 10(b) of the 1934 Act will lie for conduct subject to an express civil remedy under the 1933 Act; and 2) the standard of proof applicable to actions under Section 10(b). Although the Circuit case, *Huddleston*, 640 F.2d at 556-59, extensively discussed and approved the right of implied contribution under Section 10(b) and Rule 10b-5, the Supreme Court, while it had the opportunity, made no comment or criticism of the doctrine when the case was before it on the above two issues.

In the New York case of *Noonan v. Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982), *opinion supplemented* by 535 F. Supp. 333 (S.D.N.Y. 1982), the third-party defendants argued that the Second Circuit decisions allowing contribution, *Globus*, 318 F. Supp. 955, *aff'd per curiam*, 442 F.2d 1346 and *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981) would now be overruled in light of the recent Supreme Court decisions in *Texas Industries* and *Northwest Airlines*. The *Noonan* court in rejecting this argument first recognized that the Supreme Court specifically left open the question of *Globus'* continued vitality in the two footnotes. *Noonan* at 1008. Second, both *Texas Industries* and *Northwest Airlines* stressed it was dealing with a specifically created statutory remedy, and reasoned it would be inappropriate to modify the remedy provided by Congress. *Noonan*, at 1008. Here, the *Noonan* court noted, on the other hand, it was dealing with " 'a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one

way or another. . . . ' " *Id.* citing to *Blue Chip Stamps*, 421 U.S. at 749.

Once again, in a New Jersey case, *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984), the third-party defendants cited to *Texas Industries* and *Northwest Airlines* for the proposition that no cause of action for contribution should be implied under the securities laws. The *Seiler* court declined to accept this analysis, citing to the two previously discussed footnotes in *Texas Industries* and *Northwest Airlines* whereby the Supreme Court expressly limited its holding to the particular statutory scheme in question and expressed no view about the availability of an implied right of contribution under the securities laws. *Seiler* at 885 citing to *Texas Industries*, 451 U.S. at 640 n.11; *Northwest Airlines*, 451 U.S. at 91 n.24.

The most recent case to disagree that *Texas Industries* and *Northwest Airlines* bar a right to implied contribution under Section 10(b) and Rule 10b-5 is *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D. Ohio 1990). The *Baker* court first discussed the facts and holdings in *Northwest Airlines* and *Texas Industries* and the few district court cases that have applied those cases to find no right of contribution under Section 10(b). *Baker* at 843-44. In rejecting that *Northwest Airlines* and *Texas Industries* foreclosed the implied right of contribution under Section 10(b), the court, citing to those cases' two applicable footnotes, noted that "[f]irst, the Supreme Court expressly reserved judgment on the question of applicability of its reasoning to § 10(b) cases. *Northwest Airlines*, 451 U.S. at 91 n.24 . . . ; *Texas Industries*, 451 U.S. at 640 n. 11. . . . Second, *Northwest Airlines* and *Texas Industries* are fundamentally different from this case. *Northwest Airlines* and *Texas Industries*

both dealt with statutory remedies which expressly created a private right of action, at the same time omitting any right of contribution. By contrast, the private right of action under § 10(b) has itself been judicially implied." *Baker* at 844.

2. The Great Majority of Federal Courts Continue to Imply a Right of Contribution Under Section 10(b) and Rule 10b-5

Since the Supreme Court decisions in *Texas Industries* and *Northwest Airlines* in 1981 approximately two dozen federal courts, including the Ninth Circuit in *Smith v. Mulvaney*, 827 F.2d 558, have continued to hold that the implied right of contribution is a viable doctrine under Section 10(b) and Rule 10b-5. As previously discussed, four different courts have discussed why *Texas Industries* and *Northwest Airlines* are inapposite; the other courts did not find it necessary to do. As posited in a law review article, considering the opportunities that the Supreme Court has had to address the right of implied contribution under Section 10(b) and Rule 10b-5 and its failure to do so, strict statutory construction would appear unlikely. Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution. Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987), U. Cin. L.Rev. at 782.

III.

"SETTLEMENT BARS" ARE TYPICAL TO CONTRIBUTION CASES AND SHOULD NOT BE USED AS AN EXCUSE TO DISALLOW CONTRIBUTION

Petitioners' contention that contribution "settlement bars" somehow create a secondary level of jurisprudence that impedes the process of settlement begs the question of the propriety of contribution. While no defendant may wish to settle without the protection of a settlement bar, if contribution were not available, there would be no effective way to see that all culpable parties, whether named as defendants or not, were held responsible for plaintiff's loss.

Moreover, for Petitioners to complain about the problems inherent in the administration of contribution is nothing but a red herring. Contribution is now a well accepted means of apportioning liability among tortfeasors (See, Section I.) and at least thirty-nine states and the District of Columbia now recognize some right of contribution among joint tortfeasors. *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. at 549 citing *Northwest Airlines*, 451 U.S. at 87 n.17.

Recognizing that contribution may in some instances inhibit settlement in complex, multiple defendant actions, several states have enacted statutes which have become generically known as "settlement bar statutes." *Nelson v. Bennett*, 662 F. Supp. at 1328-29. Under the terms of these statutes, a partial settlement will operate to bar non-settling defendants from asserting cross-claims for contribution against settling defendants. The purpose of these

statutes is to encourage settlement and also to complement the equitable goals underlying the right of contribution. *Id.* at 1329.

Thus as settlement bar statutes are a necessary fixture of contribution in state courts, there is no reason to decry their appearance in federal courts.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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